Supreme Court of the United States.

No. 227.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiffs in Error,
vs.
EDSON C. BANGS,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Minnesota.

BRIEF FOR PLAINTIFFS IN ERROR.

H. L. BAKER,
Of Counsel for Plaintiffs in Error.

DETROIT:
THE DETROIT FREE PRESS PRINTING HOUSE.
1881.

UNITED STATES OF AMERICA.

SUPREME COURT.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiffs in Error,
vs.
EDSON C. BANGS,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Minnesota.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This was a suit brought against the plaintiffs in error, in the Circuit Court of the United States for the District of Minnesota, on two policies of life insurance, for $5,000 each, issued by the plaintiffs in error upon the life of James H. Bangs, father of the defendant in error, for the benefit of the latter. The company pleaded in bar of the action, a decree of the Circuit Court of the United States for the Eastern District of Michigan, whereby these policies were declared void for fraud in their procuration, and were directed to be surrendered up and cancelled, and also whereby the claimant under the policies, and his representatives, were enjoined from prosecuting suit upon the policies. An exemplification of the record of that decree was annexed to and

made a part of this plea or answer. This answer alleged the following facts: That on the 24th day of March, 1876, the defendants, then being a corporation existing under the laws of the State of New York and a citizen of the State of New York, duly filed, as complainants, in the Circuit Court of the United States for the Eastern District of Michigan, their bill of complaint against Edson C. Bangs and one Eliza E. Bangs, his mother, both of whom were then citizens of the State of Michigan and inhabitants of said last named district, to have the two policies of insurance set out in the plaintiff's complaint adjudged null and void, and delivered up and cancelled, and to have the defendants enjoined from prosecuting any action at law on the policies. That the said bill of complaint, after setting out the citizenship of the parties as aforesaid, alleged, amongst other things, that the policies in question were issued upon the written application of the defendant Edson C. Bangs, and his father, James H. Bangs, the assured. That the policies were delivered to James H. Bangs, December 2, 1875. That these policies and all others issued by this company did not contain the usual clause providing against liability in case of suicide by the insured—the company intending and undertaking, in its policies to insure against death by suicide when such death is not contemplated by the assured at the time of taking his policy and where it is not effected in pursuance of a fraudulent intent. That two days after the delivery of the policies the assured died from the effects of poison voluntarily taken by him for the purpose of producing, and which in fact did produce his death. That the assured, at the time he applied for and obtained the policies, intended to effect his own death within a short time thereafter, and thereby to defraud the insurance company out of the amount of the policies. That the death of the assured was accomplished in pursuance of such fraudulent design, and that the defendants to the bill, Edson C. Bangs, the beneficiary, and Eliza E. Bangs, his

mother, were endeavoring to conceal the means and manner of the death of the assured, and to suppress the evidence thereof and prevent an examination of the body of the deceased for the purpose of ascertaining whether death was caused by poison. The bill also proceeded to set forth the history of the case, alleging the facts which complainants would prove in support of the charges of fraud, and of which the following is a brief *resumé*:

Before taking this insurance, Mr. Bangs consulted agents of two other companies, viz: The Mutual of New York, and the Mutual Benefit of New Jersey, with a view to obtaining insurance upon his life; but he declined to insure in either of those companies for the expressed reason that their policies contained the clause commonly known as the suicide clause, *i. e.*, a clause declaring the policy forfeited in the event of the insured "dying by the hand of justice, insurrection or suicide." He then induced a fire insurance agent to apply for and obtain the agency for the New York Life Insurance Company, for the purpose of taking his application, saying to the agent that he was acquainted with the forms of policies issued by that company and liked them better. The agency was accordingly applied for and obtained, and Mr. Bangs made applications for two policies of insurance for $5,000 each. The medical examiner, Dr. F. B. Galbraith of Pontiac, found him upon examination to be a strong, robust man, and pronounced him a first-class risk. Instead of paying the first premium, viz., $205.80, Mr. Bangs gave his note therefor, dated November 16, and payable 20 days from date. The policies were issued as applied for, and on December 2 were delivered to Mr. Bangs. About the same time Mr. Bangs took a policy of insurance upon his life for $2,500 in another company.

The insured continued in his usual good health until the night of December 5, nineteen days from the date of the 20 day premium note. When his wife went to bed that night he remained up, saying that he wanted to do some writing. Between 11 and 12 o'clock the wife heard a fall upon the floor and groans from the room below. She immediately ran down stairs and saw Mr. Bangs lying on the floor, but instead of going up to or near him she ran out of doors and to the house of a neighbor, a Mr. Williamson, whom she summoned to go to her husband, who she said was dying. The neighbor went directly to Mr. Bangs; but Mrs. Bangs went to the house of another neighbor and remained there. That the only eye-witness of the sickness and death of the insured was the neighbor Williamson, who, as a witness under oath, narrates the facts as follows:

"I went right into the house and into the room where Mr. Bangs lay. I found Mr. Bangs lying on his back on the floor, stretched right out. He was lying quiet when I went in, except that he had his arms drawn against his chest and he was moaning, with frequent jerkings of the arms and chest. His hands were clenched. I took hold of his right arm and held it about three or four minutes, when he turned his head and looked at me. I asked him if he had ever been troubled with anything of the kind before, and he answered, 'No, I am dying.' I asked if his trouble was in his head and he did not give me any answer. I asked him if I had not better send for a doctor. He answered, 'No, it is of no use; I am dying. You can do so if you want to.' And then he asked, 'Where is my wife?' That was the last he said. I then started to go into Mrs. Kittridge's after Mrs. Bangs, and just as I started Mrs. Kittridge came in. I told Mrs. Kittridge she had better send for a doctor, and she then went after the doctor. I then turned to where Mr. Bangs lay and found him jerking and in spasms again. I then caught him by the hand again and held it about a minute and a half or two minutes, when he stiffened and died."

That the condition and symptoms of the deceased before and at the time of his death, and the indications thereafter, were such as to create a moral certainty that the death was caused by poisoning with strychnia, and to preclude the possibility of accounting for the death upon any other hypothesis. On the evening prior to that of his death, the insured visited a drug store in Pontiac which he was not in the habit of visiting and spent some 20 or 30 minutes standing behind the prescription case in the rear part of the store, ostensibly examining, or reading from, a medical dispensatory. While there he was, during most of the time alone in that part of the store, and was screened from observation by the case in front of him. In this prescription case and within easy reach were kept, open and ready for use in filling prescriptions, various poisonous drugs appropriately labeled, including strychnia.

Mrs. Bangs did not go near to her husband or speak to him during his illness. After hearing him fall upon the floor she got up and went down stairs, but instead of going to her husband's side to aid him or to see how, if at all, he was sick, she immediately ran out of the house and went to the neighbors. Upon returning in company with Williamson, she went into the adjoining house instead of her own, and remained there until some time after her husband's death.

On the day following the death, Monday, the matters pertaining to this insurance were placed in the hands of attorneys, who immediately made arrangements for the holding of a coroner's inquest on Tuesday. A coroner's inquest was accordingly held on Tuesday, and, nothing being elicited to show what the cause of death really was, a verdict was

promptly given that the deceased "had no marks of violence appearing on his body and died by the visitation of God in a natural way and not otherwise." Some consultation was had between the jurymen and the coroner about having a *post mortem* examination, but they concluded it could not be had unless the family were willing. The prosecuting attorney did not attend the inquest.

On Tuesday evening persons representing the insurance companies arrived at Pontiac and requested the widow, in view of the large interests involved, to allow a *post mortem* examination to be made. They found her in company with her legal counsel, and their request met with an unqualified refusal. They made strenuous efforts to obtain a *post mortem* examination, but in vain.

Shortly after the burial efforts were made to procure the disinterment of the body for the purpose of holding an inquest and a *post mortem* examination under the Michigan statute of 1873, which provides for such disinterment and examination in cases of suspected poisoning. After some days a warrant was issued by a justice of the peace of the county upon complaint made and testimony taken before him, for the disinterment and examination of the body. The sheriff delayed executing this warrant for a day after it was placed in his hands, and in the meantime the widow's counsel filed a bill on her own behalf in the Circuit Court for the county of Oakland, in chancery, and obtained an injunction against the sheriff, the justice of the peace and two of the witnesses, prohibiting them from disinterring the body and from issuing or executing any warrant for that purpose. The defendants in that suit appeared and answered the bill and moved to dissolve the injunction. This motion was opposed, principally on the ground that, there having been one inquest, another could not be held. After a full argument the motion was denied and the injunction sustained. It was well understood by all concerned that this decision practically put an end to all chance of ascertaining through the aid of the State courts whether the remains contained poison or not, inasmuch as the symptoms indicated strychnia, and before the defendants in that suit could get the injunction dissolved in the Supreme Court the traces of poison would all have disappeared by decay.

On February 24th the company presented to Mrs. Bangs and to the son and his general guardian, a communication in writing in which the company requested that an autopsy of the body of the deceased might be had, and offered to bind itself to pay the policies forthwith and without further question, if upon such autopsy being made no poison should thereby be detected. The request was refused.

The bill further stated, that the company had no knowledge of the fraudulent intent of the insured, or of any of the foregoing facts tending to show such intent, until after the death of the insured; and that upon learning the facts, they gave notice to the beneficiary and his guardian, and also to the mother, that they claimed a rescision of the policies in consequence of the fraud practiced, and offered to surrender up the note for $205.80 which had been given for payment of the first premium—that note being then still unpaid, and being the only consideration ever received by the company for the policies.

To the Defendant's Answer thus made in this cause plaintiff interposed a demurrer; specifying as grounds of demurrer that the answer on its face contained no statement of facts sufficient to constitute a defense; and also that the proceedings in which the decree pleaded was rendered were void on their face, in that they showed that the court rendering the decree acquired no jurisdiction of the person of the defendant, and no jurisdiction in equity over such action.

The court sustained the demurrer on the ground that the decree pleaded in bar was void for want of service of process on the infant defendant, and gave judgment to the plaintiff for the amount of the policies ($10,000) and interest.

ASSIGNMENT OF ERRORS.

The court below erred in sustaining the plaintiff's demurrer and awarding judgment against the defendants notwithstanding their plea in bar. And especially in holding the decree in equity void for want of service of process on the infant defendant.

So far as the attorneys and counsel for the plaintiffs in error are informed, no written opinion has ever been filed by the court below, and no oral opinion was delivered further

than this, that the court, in rendering its decision, announced as its conclusion that the decree pleaded was void for the reason that the process for appearance in the equity court was not served in accordance with the thirteenth Equity Rule. It is therefore not possible to make a further or more specific assignment of errors than the foregoing.

ARGUMENT.

The only point involved in this case, and necessary to be argued here, seems to be that upon which the court below based its decision, viz: Did the court of equity have jurisdiction of the infant defendant so as to enable it to render a decree touching the policies in question, which should be binding on the infant until reversed?

The court of equity having adjudged the subject matter of the complainant's bill to be of equitable cognizance, the above question seems to be the only one arising on the plaintiff's demurrer.

And as all presumptions are in favor of the validity of this decree, including the presumption of jurisdiction (*Harvey v. Tyler*, 2 Wall., 341–2, and cases there cited), we have only to consider the question whether the record of the decree pleaded shows affirmatively on its face that the court rendering the decree had no jurisdiction.

As touching the jurisdiction of the Federal court in Michigan over the infant defendant the following facts are, for the purposes of this case, to be taken as established, viz.:

That the defendants in the equity suit were citizens of the State of Michigan and resident within the Eastern District, where the suit was brought. (Printed Record, pp. 271 and 293.) That the defendant Edson C. Bangs was an infant, residing at Pontiac, in Oakland county, where the father resided at the time of his death. That he was under the guardianship of a general guardian appointed

by the Probate Court for Oakland county, that being a State court vested with the care and custody of the persons and property of infants resident in Oakland county. That this guardian, one John M. Smith, resided in Oakland county, and within the jurisdiction of the court. That as such general guardian he was by law vested with "the care and management of the estate of the minor," also with the right to "demand, sue for and receive all debts due to him" (the minor), and was also required by law to "appear for and represent his ward in all legal suits and proceedings unless where another person is appointed for that purpose as guardian or next friend." (Statutes of Michigan, Compiled Laws of 1871, § 4831.) That the marshal to whom the subpœna was directed for service was unable to find the defendants in his district. That he found the general Probate guardian of the infant defendant, and made service of the subpœna upon him, together with a written notice advising him of the purport of the writ and of the necessity for the appointment of a guardian to appear and defend the interests of the infant named in the writ. (Record, p. 289.) That the court to which the process was returnable adjudged the service on the general guardian to be sufficient service on the infant to authorize the appointment of a guardian *ad litem* in the cause, and thereupon made an order appointing John M. Smith (he being the general guardian on whom the process had been served) to be the guardian *ad litem* of the infant defendant in the cause, unless the infant should, within ten days after service on him (or on his guardian if he be not found), himself procure a guardian *ad litem* to be appointed. (Record, p. 295.) The order also provided for service of a copy of the bill of complaint on the general guardian, and directed that the appearance of the infant should be entered within fifteen days after such service. This order was entered May 15, 1876. Two days later a copy of this order together with a copy of the bill of complaint was served on

the general guardian. (Record, pp. 297–8.) The guardian, however, took no action on behalf of the infant, except to write a letter to the district judge, under date of June 5, 1876, a copy of which will be found on pp. 301–2 of the printed record. This letter was handed to the clerk of the court for attention, who wrote in reply a letter, a copy of which is on page 302 of the printed record.

On June 15, there having been no appearance entered for the infant, and no acceptance by the general guardian of the appointment to act as guardian *ad litem*, the court, on a petition filed by complainants showing the facts (Record, p. 300), entered an order revoking the appointment of Smith as guardian *ad litem*, and appointing in his stead, as such guardian in the cause, Henry A. Harmon, an attorney and counsellor of the court. (Record, p. 302.) Mr. Harmon duly accepted the appointment and made answer for the infant (Record, pp. 303 to 305), denying all the important allegations of the bill. To this answer the complainants filed a replication; and on the issues so made full proofs were taken; the cause was regularly brought to a hearing at a general term of the court, on pleadings and proofs, and the court, after a full hearing, rendered the decree in question.

The validity of this decree, when drawn in question collaterally, as in this case, depends upon whether the court rendering it had jurisdiction to make the order appointing the guardian *ad litem*. If the court had any judicial power over the subject of appointing a guardian *ad litem* in the case before it, that power having been exercised, and the guardian appointed having accepted, and appeared and made defense for the infant, the decree rendered is binding until reversed.

The question, therefore, is whether the order making the appointment came within the powers of the court of equity, or whether it was merely extra-judicial.

The power of the court to make the appointment is denied

upon the ground that the subpœna was not served on the infant personally, nor served in any other method which would constitute a compliance with the terms of the thirteenth Equity Rule.

GENERAL PROPOSITION.

The court had jurisdiction to appoint a guardian *ad litem* in the cause, notwithstanding the alleged want of service of process.

FIRST.

It had this jurisdiction inherently, by virtue of its constitution and general powers as a court of equity.

Courts of equity are, by their constitution, vested with a personal jurisdiction over all infants resident or found, within the territorial limits of the court's jurisdiction.

They are the legally constituted guardians of all such infants.

As to all such infants, they are vested with that *patria potestas* which belongs to the sovereign power in every civilized state as *parens patriæ*.

2 Story's Eq. Jur., secs. 1327 to 1335.

And this power they may exercise even to the exclusion of parents, friends and all others.

Such is the well established jurisdiction of the English Court of Chancery over infants.

Adams' Eq., p. 281.
Johnstone v. Beattie, 10 Clark & Finnelly, 42.

The case last cited was a bill in chancery, asking that an infant, whose property and legal domicil were in Scotland, but who was temporarily sojourning in England, might be made a ward of court, and placed under guardianship in England, for the purpose of preventing

her removal to Scotland by her Scotch tutors and curators, who had been regularly constituted such by testamentary appointment of her father, a domiciled Scotchman. The chancellor appointed the guardian, notwithstanding the fact that the infant's domicil, and all her property, was in Scotland; and, on appeal to the House of Lords, the action of the chancellor was sustained. Although Lords Brougham and Campbell were of opinion that the chancellor erred in appointing a guardian on this bill, the judges were unanimous in holding that the court *had the power* to make the appointment. The court say:

Lord Brougham (p. 93): "The necessity of extraordinary protection to unprotected infants, leaves no doubt of the power in the sovereign, or those to whom he has delegated it, to appoint a guardian whensoever an infant comes before him or them, and requires protection. The jurisdiction of the Court of Chancery in the present case flows from that source, and is indisputable. And I must be allowed to observe, in passing, that much of the argument and reasons of the authorities urged for the respondent, have been pointed to combat a position which is not at all a necessary part of the appellant's case; namely, the supposed denial of the court's jurisdiction. That jurisdiction I hold to be indisputable. But it does not follow that, in every case, the jurisdiction must be exercised; that the court is bound, as a matter of course, always to interfere; that the nomination of a guardian is of such necessity as to follow immediately from the fact of infancy coming to the court's knowledge, in the same manner in which the dismissal of a suit for want of prosecution, or signing a decree by consent of all parties on matters that leave no option to the court. The court always, and in every case, has the jurisdiction, but it is not always and in every case a matter of course that it should be exercised; on the contrary, though the right is absolute, its exercise is discretionary; so that in many cases the exercise of it, I hold, would be a plain miscarriage of the court, and one that would require correction by the court of appellate jurisdiction. Thus, the Court of Chancery has interfered in preventing the father himself from exercising the *patria potestas* over the child, when the situation and the interests of the child were competently brought before it."

Lord Campbell (p. 120): "I do not doubt the jurisdiction of the Court of Chancery on this subject, whether the infant be domiciled in England or not. The Lord Chancellor, representing the sovereign as *parens patriæ*, has a clear right to interpose the authority of the court for the protection of the person and property of all infants resident in England, even where testamentary guardians have been appointed, and even where the father is alive and actually himself resident in England. If it be for the benefit of any infant that the court should appoint guardians, to become officers of the court, and to take care of the person and property

of the infant, under the superintendence and control of the court, there can be no doubt of the power of the court to do so. Although this jurisdiction was probably very rarely exercised till the abolition of wardship with the military tenures, and the great increase of personal property in modern times, I have no doubt that it existed at common law."

Lord Langdale (p. 145): "Amidst the differences of opinion which exist in this case, it is satisfactory to me that no doubt is thrown upon the jurisdiction of the Court of Chancery to appoint guardians for any infant residing in England." "The jurisdiction being indisputable, the exercise of it in particular cases, becomes a matter of discretion and expediency, depending on the peculiar circumstances of each case."

This jurisdiction over infants is a part of the general jurisdiction of the English Court of Chancery; and is not, as the custody of idiots and lunatics is sometimes said to be, a power delegated by the crown to the chancellor as such.

2 Fonblanque's Eq., notes, pp. 227–230.
2 Story's Eq. Jur., sec. 1329.
Spence's Eq. Jur., 614, note.
See also Johnstone v. Beattie, above cited.

The Federal courts of equity are, with respect to cases within their jurisdiction as to citizenship or residence of parties, vested with the same jurisdiction as that which was exercised by the English Court of Chancery at the time of the adoption of the constitution.

1 Story's Eq. Jur., sec. 57, and authorities there cited.
Baker v. Biddle, Baldwin's Rep., 411.

This as a general proposition is fundamental; and it is submitted that there is no principle or authority which excepts from its general terms the jurisdiction of chancery for the protection and guardianship of infants.

The Federal courts of equity being vested with such jurisdiction, when a suit is brought against an infant who resides or is found within the district, the court becomes *pro hac vice* the guardian of the infant, and is immediately vested

with the power and charged with the duty of guarding the rights of the infant and attending to the making of his defense, as well as of adjudicating upon the case presented. The infant does not and cannot appear, either by attorney or in person; but the court attends to the making of his defense, and for that purpose appoints an officer whose duty it is to bring before the court whatever is essential to the infant's rights.

Such being the case, it is difficult to see how any service (or even the issuing) of process is essential to give the court of equity jurisdiction of an infant defendant.

Indeed, it would seem quite clear that the court *has* the jurisdiction without process, and may exercise it as may seem proper, and is itself to determine in each case what notice of the suit ought to be given either to the infant or to his guardian, parents or friends; any abuse of discretion in the exercise of such jurisdiction being amply provided against, in that the action of the court in that regard is subject to be reviewed by this court at any time within two years after the coming of age of the infant. (U. S. Revised Statutes of 1874, sec. 1008.)

This minor is now, and for some time to come will be at liberty to bring before this court for review the proceedings of the Federal equity court in Michigan.

It is, therefore, insisted (although the doctrine is broader than this case requires) that had no steps been taken to serve process in this case preliminarily to the appointment of the guardian *ad litem*, this decree, although it might perhaps be held erroneous by this court on appeal, would still be *prima facie* binding and valid as against a collateral attack. It would be presumed that the court did its duty in appointing the guardian, and also that the guardian *ad litem* performed his duty, and that the infant and his probate guardian, parents and friends had full opportunity to make defense for him;

and, furthermore, that all the defense which he had to make was made.

See Preston v. Dunn, 25 Ala., 513.
Rob v. Lessee, etc., 15 Ohio, 699.

In the case of *Preston v. Dunn*, 25 Ala., 513, the plaintiff sought to question collaterally a decree rendered in a case where a guardian *ad litem* of an infant defendant had been appointed without the issuing or serving of process against the infant. The court say (p. 513):

"The chancery court is the general guardian of all infants "within its jurisdiction; and by virtue of its general powers "has authority to protect their rights, when defendants in that "court, by the appointment of a guardian *ad litem;* and it is "proper that the chancellor, in making the selection of the "guardian, should hear the nearest relative or protector of the "infant, if under the age of fourteen, or the infant himself if "over that age. For this reason, if the infant is not brought "into court by service before the appointment is made, we "hold it to be an irregularity sufficient to reverse the decree "on error; but we have found no case which goes to the length "of denying to the chancellor *the power of making the* "*appointment without service.* The authority to do so "results, as we have said, *from the general powers which* "*belong to the chancery court*, and may be exercised when-"ever the fact of infancy is established, and the infant is "within the jurisdiction of the court. 2 A. K. Marsh, 166; "4 Dana, 429; 8 B. Mon., 102; 8 Gill. and J., 136; 15 "Ohio, 689. The improper exercise of this authority may "be reviewed on error, but the act is not *void*, and the "decree rendered could not therefore be attacked collaterally "for the want of jurisdiction."

The case of *Rob v. Lessee, etc.*, 15 Ohio, 699, was an action of ejectment brought by infants for lands sold at administrator's sale under an order of the Probate Court in proceedings

taken by the administrator for that purpose. The statute authorizing the proceeding required that the infant heirs should be made parties defendant. The infants were named in the petition; but they were not served with process or notice, and a guardian *ad litem* was appointed. The validity of the administrator's sale was attacked in this collateral suit. The court, upholding the sale, say:

"It seems to me to be unnecessary in this case to go into an investigation of the question whether infants can be made parties to a suit in chancery, so as to be bound by a decree, without personal service, merely by the appointment and appearance of a guardian *ad litem*. Much is said in the books upon the subject. But I apprehend it will be found upon examination that decrees entered under such circumstances are generally, if not universally, holden to be voidable, not void. Such, I have no doubt, is the weight of authority."

But, granting, for the sake of argument that service of process effected in some legally authorized manner, was essential to give jurisdiction, we then insist that:

SECOND.

There was service of process in a legally authorized manner.

That there was such service, is, for the purposes of this case, established by the judgment of the court to which the process was returnable. The service upon the general guardian which was made was sanctioned by the court, and was *adjudged by the court to be sufficient*. This judgment of the Federal court in Michigan upon the sufficiency of the service was a judicial determination of that question, and was not subject to be reviewed in a collateral proceeding by the coordinate Federal court in Minnesota.

Upon the facts shown to the court in Michigan on the application for the appointment of a guardian *ad litem* (see printed Record, pp. 291–295), a question was presented

for the judgment of that court as to whether sufficient notification of the suit had been given to justify the court in appointing a guardian *ad litem*, and the judgment which that court rendered thereupon was therefore binding until set aside or reversed.

Every court is of necessity the judge in many respects of its own jurisdiction, and of the sufficiency and regularity of all proceedings taken in the progress of a cause pending before it. And whenever facts are presented which raise a question calling for judicial determination, and the court actually makes an adjudication thereupon, such judgment is conclusive, whether it be an interlocutory order upon a jurisdictional or other question arising in the progress of the cause, or a final judgment upon the merits.

In the case of an adult defendant, if anything be done toward effecting service of process or otherwise subjecting the defendant to the jurisdiction of the court from which actual or constructive notice to defendant of the suit may be inferred or presumed, and the court adjudges the acts done to be sufficient and renders judgment, the judgment is not void however erroneous it may be found on appeal.

See Isaacs v. Price, 2 Dillon, C. C., 351.
Saulsbury v. Sands, ibid., 277.
Sprague v. Litherberry, 4 McLean, 450.
Pettiford v. Zoellner, Mich. Supreme Court, January Term, 1881, 8 N. W. Reporter, 451

A proper regard for the sanctity of judicial proceedings would seem to require that the judgment of a court upon any question should be treated as binding until reversed, wherever there was anything before the court upon which to base an adjudication; and that the fact that the court actually undertakes to adjudicate, should be at least presumptive evidence that there was something before the court which called for an adjudication.

Obviously it will not do to say, as is implied in the judgment of the Federal court in Minnesota, that in every case the service of process must be in strict accordance with certain prescribed forms, and that the court in which any decree is pleaded may re-examine the question whether service was effected in compliance with those forms, and if it come to a conclusion different from that of the court rendering the decree, may declare the decree void for want of jurisdiction.

If we are right in our position that the judgment of the Michigan court upon the question of its jurisdiction is, for the purposes of this case *res judicata*, there is no occasion or room for discussion here as to the *sufficiency* of the service of process which was made. Such a discussion would imply that the Minnesota Federal court had authority to judge of the sufficiency of the service, and that this court is now to review the judgment of the latter court in that regard.

But it may be urged, as the judgment below seems to have assumed, that unless it is made to appear that service of process was had in one of the methods pointed out in Rule 13, of the Equity Rules, there cannot be said to have been any service at all, or anything tending to show service, so that the judgment of the court upon the question of its own jurisdiction would have nothing to rest upon.

The obvious answer to this is, that sufficient grounds on which to base the judgment would be presumed. But aside from this answer to the position thus taken, we insist that Rule 13 has no such effect as by the judgment of the Minnesota court it is assumed to have.

By that judgment it is assumed that Rule 13 prescribes the only method by which the court can lawfully compel a party to submit to its jurisdiction; and that it cuts off all power and discretion with which the Circuit Courts as courts of original equity jurisdiction were originally vested by law,

to prescribe and judge of methods of service of their own process.

It should be specially noticed that the judgment assumes, and must assume, that the rule not only lays upon the Circuit Court an obligation in all cases to follow strictly its provisions in practice (an obligation enforcible by the supervisory control of this court), but absolutely restricts the judicial power of the Circuit Court in that regard to the precise formalities prescribed in the rule, so that if those formalities are not strictly followed the action of the court is extra-judicial.

The assumption was unwarranted in both the particulars mentioned.

Rule 13 does not take away any inherent or other powers which the Circuit Courts possess, to direct or control the service of their own process, however it may control the exercise of those powers.

Courts of equity have power in certain cases to direct substituted service.

1 Barb., Ch. Pr., p. 52; 1 Dan., Ch. Pl. & Pr., pp. 502 to 506.

It certainly will not be claimed that Rule 13 takes away this well recognized power?

They also have power, on cause shown (of the sufficiency of which they are to judge), to order extraordinary service.

1 Barb., Ch. Pr., p. 52; 1 Dan., Ch. Pl. & Pr., pp. 502 to 508.
Hope v. Hope, 4 De Gex M. & G., 341.

It is submitted that Rule 13 was never intended to take away these inherent and well recognized powers.

The rule is a practice regulation merely as distinguished from a law fixing a limitation upon the power of the court. It does not, as is implied in the ruling below, curtail the jurisdiction of the Circuit Courts by drawing hard and fast lines

within, and in accordance with, which that jurisdiction must be exercised in order to constitute judicial action.

Should this court make a rule directing that process against an infant should be served on his guardian if he have one, service so made would undoubtedly give jurisdiction. Hence the subject of providing for service in such cases belongs to the domain of practice regulation, and not to that of jurisdictional pre-requisite; for the jurisdiction of the Circuit Courts cannot by rule be enlarged, so as to embrace cases not otherwise within it, any more than that jurisdiction can be taken away by rule.

And if the method of service in such cases be matter for practice regulation at all, it is within the power of the Circuit Courts to make provision for it, either by standing rule or by special order in each particular case. If their action in that regard should in any instance conflict with the rules made by this court, that action would be erroneous, but not void.

Neither does the rule undertake to prescribe methods of service which shall take the place of all other lawful methods theretofore existing.

It does not provide expressly for the case of an infant defendant. Nor does it provide methods of service where the defendant is a lunatic or an idiot.

And it must be admitted that it does not prohibit the authorization of *substituted* service in cases where such service has been usually authorized. Substituted service is habitually ordered, and passes unchallenged. But there is nothing in the terms of the rule to prohibit the exercise of the usual discretion in directing the service of process against infants, which would not apply with equal force to prohibit substituted service.

It is submitted that this rule is to be read in connection with the ninetieth Equity Rule, and in view of the practice existing at the time of the adoption of the rules; and that

cases like the one at bar, in which methods of service of process different in character from those pointed out in Rule 13, have been sanctioned in practice are "cases where the rules prescribed by this court do not apply," and are therefore to be regulated by the practice of the court of chancery in England.

That a judgment or decree against an infant founded upon service of process similar to that in question, is not void and open to collateral attack. See the following cases:

Nelson's Lessee v. Moon, 3 McLean, 321.
Dan., ex dem., Sprague v. Litherberry, 4 McLean, 442.
Carrington v. Brent, 1 id., 174.
S. C. Caldwell v. Carrington, 9 Pet., 101.
Preston v. Dunn, 25 Ala., 512 (analyzed supra. under first point.)
Lessees of Ewing v. Higby, 7 Ohio Cond., 342.
Rob v. Lessee, &c., 15 Ohio, 699 (cited and analyzed under first point.)
Benningfield v. Reed, 8 B. Monroe, 102.
Bustard v. Gates, 4 Dana, 430.
Bank of U. S. v. Cochran, 9 Dana, 395. (In the latter case it affirmatively appeared that the infant was not notified of the suit.)
White v. Albertson, 3 Dev., 243. (In this case the process was issued against and served on the general guardian, naming him.)

In *Nelson's Lessee v. Moon*, *supra*, the plaintiff sought to attack collaterally a decree rendered in an equity case, where guardians *ad litem* had been appointed for infant defendants without service of process on or notice to the infants. The court holding that the decree was not open to collateral attack, say:

Per McLean J.: "The two infant defendants appeared

"by guardians *ad litem*, and it is objected that this was done "without a notice having been served on the infants. If it "be admitted that for this defect in the proceeding the "Supreme Court would have reversed the decree, yet it does "not follow that the decree when collaterally used can be "treated as a nullity. There was an appearance by a guar- "dian specially appointed by the court to defend the suit, "and the presumption will be in favor of the proceeding, "and not against it when used as evidence. A judgment or "a decree may be treated as a nullity if it appear from the "record that there was neither a service of process nor a "waiver of it. But in the present case there was an appear- "ance, according to the forms of law, and that gave jurisdic- "tion to the court. The objection at most is to an irregu- "larity which might be ground of reversal, but does not "show a want of jurisdiction in the court."

In *Sprague's Lessee v. Litherberry, supra*, the decree questioned collaterally had been rendered in a case where a general guardian waived service of process for the infant, and was appointed guardian *ad litem*. Both appointments seem to have been by the same court, that of general guardian having been made before the suit was begun. It was claimed that both appointments were nullities. The court, per McLean J., say: "The only objection to the first appointment of Yeatman" (i. e., as gen- "eral guardian), "is that the minor heirs were not within Hamilton "county at the time the appointment was made. That this would be "examinable by the Supreme Court on a *certiorari* or otherwise, may be "admitted. But can it be examined into collaterally? In *Ludlow's Heirs "v. McBride, 3 Ohio, 257*, the court say 'so far as the Courts of Common "'Pleas were invested with jurisdiction over the subject matter upon "'which they have acted, their decisions and orders are final and conclu- "'sive; if not reversed for error, they cannot be impeached collaterally. "'The grounds and proofs on which they proceeded are not examinable "'in this case.'"

"This is an important question of law which must rest upon general principles, and does not depend on the construction of a statute.

"In making the appointment of guardian, the court having general jurisdiction, is presumed to have examined the facts on which their jurisdiction depended." * * * *

"The matter of fact as to the residence of the minors when Yeatman was appointed guardian was, of necessity, before the Court of Common Pleas when they made the appointment; and it was not necessary to place that fact upon record. That court determined it, and can the fact be open to proof collaterally when the record is offered in evidence? If such be the law, then every fact necessary to be established in a judicial proceeding, whether it relate to the jurisdiction of the court, or to the merits of the case, and which did not constitute a part of the record, is open for examination. And how numberless are these facts in the action of courts?

"In this view less effect would be given to the judgment of the court than to the verdict of a jury. In the transaction of its business, a court in almost every step taken in a cause must act upon rules adopted by statute or by judicial discretion. And all these rules impose limitations, within which certain things must be done. And when the court, having the subject before it, decides a matter under these rules, can such matter ever be inquired into collaterally?

"Admit all that is contended for, in regard to the residence of the infants when the guardian was appointed. No one will contend that the minors must, in fact, be within the county when the appointment was made. They may have been absent on a visit; their own mother was not living, and they were left in charge of their step-mother. Her home would be their domicil, and by the law she was entitled to occupy the mansion house one year from the death of her husband. What is to fix the domicil of infants? The home of these infants was in Hamilton county. Their property was there, and it was there only that a guardian could properly be appointed. If they had not, at the time, an actual residence in Hamilton county, they had constructively. It was the place of their birth, where their father and mother lived and died, and where all their property was to be found. They had left the county, at most, only a few months before this appointment was made. There is no suggestion of fraud or unfairness in the appointment."

Lessee of Ewing v. Higby, supra, was an action of ejectment for lands sold at administrator's sale. The validity of the administrator's sale was denied because, in the proceedings under which the sale was made, the process was served on the general guardian instead of the infants. The court, holding that the order of sale could not be attacked collaterally, say (p. 342): "The court, before process issued to them (the infants), appointed Powel their guardian to

defend; then process issued to their regular guardian, Parker, not to the infants or guardian *ad litem*. On the return of service on the regular guardian, Parker, the heirs were considered in court, and as to them the order was made. * * The court, when they made the order (of sale), must have determined that by serving process on the guardian of Samuel and John, and by the appearance of the guardian of the lessors, the four heirs were parties to the petition within the meaning of the act. And this was a matter of which they had jurisdiction. Indeed they were compelled to determine this question. They could not get along without."

Bustard v. Gates, 4 Dana, 430: Ejectment by survivors of infant heirs of Sullivan for lands sold to defendant under execution on judgment against the heirs. The court rendering the judgment had appointed a guardian *ad litem* without service of process on the infant heirs. The court say (p. 435):

It is a general rule of the common law, and of common sense as well as of common justice, that a court has no jurisdiction to render a judgment against a person who has had no notice whatsoever of the proceedings against him.

"But what is notice—is a question of law, as well as of fact; and actual notice may be dispensed with, and a judgment may be rendered on two returns of *nihil*. And in the statutory proceedings against absent defendants, a decree may be rendered on constructive service merely, which is frequently, perhaps generally, no notice in fact.

"Actual notice to an infant will not enable him to defend a suit, because he is in judgment of law incompetent; And hence, according to the common law an infant cannot appear to, or defend, an action, in his own person or by attorney; and even though he may be in court, he cannot be heard, nor can the suit proceed, except through the intervention of a guardian *ad litem*, appointed to defend for him. Nor, for the same reason, can an infant prosecute a suit in his own person or by his attorney; the suit must be prosecuted by a *prochein ami*, who may, sometimes, proceed and act without the knowledge of the infant.

"In such cases, of the prosecution or defense of suits, the court acts, *pro hac vice*, as the guardian of infants. And hence, as the infant is disabled in consequence of his actual or presumed incompetence to assert his own rights or manage his own cause in a court of justice, it would seem to us that an actual judicial notification to him of the pendency of a suit

for his benefit, or against his interest, should not be deemed indispensable to the jurisdiction of the court. His ultimate security is in the protective care of the court, and in the assistance and fidelity of his guardian *ad litem* appointed by the court, to represent him, and who will be required to defend him, before any judgment or decree can be rendered against his interest. It has been frequently decided that it is not necessary to serve a judicial citation on both the idiot (or lunatic) and his committee, but that a proper notice to the committee alone is all sufficient; and that when there is no committee, the court in which the suit may be pending, may appoint one for the purpose of receiving notice and defending the suit. And it has been determined that a decree, in other respects right, rendered on such notification and defense, is not even erroneous. Then, ought a similar decree or judgment against an infant to be not only erroneous but utterly void, so that the party obtaining it may altogether disregard it as a nullity, and may, therefore, sue again for the same cause, or the infant may, *ad libitum*, treat it as a nonentity, and, if anything shall have passed under or in consequence of it, to a stranger, may elect, as a matter of right, to demand restitution? * * * *

"Neither this, nor, as far as we know, any other court whose decisions are authoritative evidence of the law, has ever decided that, without actual notice to an infant, a judgment or decree against him is necessarily void, for want of jurisdiction. And reasoning upon analogy, principle and policy, we are not inclined to go further than to say, as we have said, that such a judgment or decree, in other respects regular, is erroneous merely. This is as far as we feel bound by a sense of justice to infancy, or authorized by a proper regard for principle, or the repose and security of this country, to extend the legal effect of a want of actual notice to infants.

"In some countries, and, as we understand, in the state of Louisiana, there is never any actual judicial notice to an infant, his guardian *ad litem*, after being appointed, being alone cited to appear and defend for him. And indeed, if a court act faithfully, as we should presume every court of justice would, there will always be a virtual notice to infant defendants; because the court—acting faithfully and providently—will always appoint, as guardian to defend, some honest and competent person, generally a friend or relation of the infant; and not only will that person, if he do his duty, consult the infant, if intelligent, and also his discreet and more enlightened friends and acquaintances, but the court will see that he makes a proper defense, and will never decide the case without such defense. And should there be an improvident decision without a full and proper defense, it may be reversed merely on the ground of infancy.

"The true question for testing the validity of the judgment is only this: had the court jurisdiction over the suit? Was a guardian *ad litem* appointed by the court? And did he appear and represent the infants on the trial? If so, the judgment against them is not void but voidable only in a direct proceeding for setting it aside."

It would be superfluous to argue here that the decree of the Federal court in Michigan would be sustained by this court on direct appeal. It will be soon enough to argue that proposition when such appeal is prosecuted here, as we have already shown it may be. But it may not be inappropriate to mention here a few of the reasons and authorities deducible in support of such argument, as doubly fortifying the position that this decree is not void.

Smith v. Marshal, 2 Atk., 70.
Thompson v. Jones, 8 Ves., 141.
Smith v. Palmer, 3 Beavan, 10.
Kirwan v. Kirwan, 1 Hogan, 264.
Ewing v. Hollister, 7 Ohio Cond., 476.
Walker v. Hallett, 1 Ala., N. S., 379.
Hope v. Hope, 4 De G., M. & G., 341.

In *Thompson v. Jones, 8 Ves., Jr., 141*, the plaintiff moved, February 1st, that service of the subpœna upon the father-in-law of an infant might be good service on the infant. The Lord Chancellor having some doubt upon it, the motion stood over.

February 3d. The Lord Chancellor [Eldon]:

"The Register has furnished me with several orders that "service upon the mother shall be good service upon the "infant; and I have found several in print. Therefore you "may take the order."

In the case of *Ewing v. Hollister*, above cited, the court say:

"So far as relates to the infant defendants, the mode "adopted of giving notice was by serving a citation on "the guardian. It seems to the court that this was suffi-

"cient. It was the duty of the guardian to protect the "interests of his ward; and notice to him would be more "effectual for all beneficial purposes, than notice to the in- "fants themselves. In truth the only effect of giving notice "in any case is that it usually conveys information to their "friends, and those who would be disposed to attend to their "interests. Further, the obligation of the legal guardian to "defend his ward would be much stronger than that of a "mere guardian *ad litem*."

In the case of *Walker v. Hallett*, 1 Ala., 390, the court come to this conclusion, viz: "That it is proper that pro- "cess should be served on all resident infants, which when "they are of tender years may be executed on their guar- "dian or some of their near relations or friends."

In the case of *Hope v. Hope*, *supra*, the court, after remarking that the statute of 15 and 16 Victoria, on the subject of substituted service, was only an enunciation by the legislature of what had always been the practice before, say (p. 341): "According to the rules of law, service ought either to be made personally, or at least by leaving notice at the dwelling-house of the party. But the rule of this court differs in this respect from that of a court of law. Personal service, or service at the dwelling-house, may be impossible, because the defendant may be abroad; and yet it might be very unfit that he should not be litigated with in the same manner as if he were here, as he might have agents competent to represent and actually representing him in this country. Therefore, in cases where a defendant is abroad, the question is, whether there is any person here who may be fitly served, and service upon whom may be treated as equivalent to service upon the absent person himself. Now this has been allowed in a variety of cases; for instance, where there has been an agent in this country managing all the affairs of a defendant who is abroad, and regularly communicating with him upon his affairs, or where he has an agent here specially managing the particular matter involved in the suit. In such cases, the court has felt that it might safely allow service upon the agent to be deemed good service upon the person abroad, because the inference is irresistible that service so made upon the agent is service on a person either impliedly authorized to accept that particular service, or who certainly will communicate the process so served to the party who is not in this country to receive it himself. The object of all service is of course only to give notice

to the party on whom it is made, so that he may be made aware of, and may be able to resist, that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done that is required."

As touching the question whether the proceedings in the equity court were regular and would be sustainable on appeal, the following considerations are important: Both the infant and his general guardian resided in the district. This guardian was appointed under a law which provides as follows: "Every guardian appointed as aforesaid shall have the care "and management of the estate of the minor." (Statutes of Michigan, Compiled Laws of 1871, § 4816.) "Every such "guardian shall also * * * demand, sue for, and receive "all debts due to him [the infant]; * * * and he shall "*appear for and represent his ward in all legal suits and* "*proceedings*, unless where another person is appointed for "that purpose as guardian or next friend." (*Ibid*, § 4831.)

This same guardian forwarded the proofs of death to the company, and, describing himself as the rightful claimant under the policies, and entitled to receive the moneys upon them, made the only demand for payment of the policies that has ever been made. His right to possess the policies and assert all the rights of the infant thereunder is unquestionable. When the process was served on him he had the policies in his possession, either actually or constructively. He was, as regards the policies, clothed with all the powers incident to ownership. The infant held only the beneficial interest, and could himself exercise no act of ownership. The guardian was substantially, though not in form, vested with the legal ownership of the policies, in trust for the infant. He, and he alone, could sell the personal property of the infant. (*Livingstone v. Jones*, Har. Ch. Rep. Mich., 165.)

Under such circumstances what service of process could

be more appropriate or better calculated to secure proper attention to the infant's rights, than upon this guardian?

If in a cross suit the court may order substituted service, upon a presumption that the attorney served is authorized to represent the defendant, is there not at least as good ground for such order, where the person served is expressly authorized and required by law to represent the defendant?

FINALLY.

The doctrine contended for, viz., that a decree like that in question is valid and binding, at least *prima facie*, when questioned collaterally, is founded in sound reason and principle.

A common error in relation to the validity of decrees against infants—and the one into which the court below seems to have fallen in this case—is, a failure to properly distinguish between the purpose and effect of process for appearance in the case of an infant defendant, and the purpose and effect of such process in the case of an adult defendant; and an assumption that a decree in the one case is to be judged by precisely the same tests as in the other.

The error in such assumption is manifest. True, there is the same general inquiry in both cases, viz., whether the defendant had such notice, actual or constructive, as would answer the requirement of law that a party shall always have notice of some sort, and an opportunity to make his defense, before judgment is rendered against him. But with respect to the methods of giving such notice and opportunity to defend, these two classes of cases are very different. In the case of an adult the notice consists simply and wholly in the personal or other service of process. If the defendant fails to appear and make defense, he is presumed to have confessed the cause of action, and judgment is thereupon rendered against him. As such judgment rests wholly upon the

confession presumed from the defendant's default in not appearing, when notified of the suit, the vital question is whether there was sufficient service of process to give the required notification.

Not so in the case of an infant. There the service of process is not the only thing that conveys notice; and its purpose and effect are there wholly different. If the defendant does not appear after being served, no judgment is entered on default or confession; but the court appoints an officer to investigate the case and make every defense for the infant. And a judgment is rendered only after such defense has been made, and upon full and satisfactory proofs in support of the plaintiff's case.

When the validity of a judgment thus rendered is drawn in question collaterally, and the inquiry is made whether the defendant had notice, it is clear that the question is not to be determined by simply inquiring, as in the case of an adult, whether there was service of process from which notice might be inferred. On the contrary, the question is, *were there any proceedings prior to the decree from which notice may be inferred or presumed in favor of the judgment.* If there were any such proceedings, the judgment is valid on its face, *because it is based on such proceedings*, and not, as in the other case, upon a mere failure to appear or plead. Hence the decree in question must be held to have been made upon due notice; for it is to be presumed, at least until the contrary is proved, that the court appointed a proper person as guardian *ad litem;* that the guardian *ad litem* did his duty in notifying parties interested, and in other respects: that he made proper report to the court of his doings, and that the court was satisfied from such report that it was proper to render a decree.

Had the issue below called for or permitted it, we should have shown by proofs all the facts which are thus to be presumed in favor of the decree. We should have shown that

SUPREME COURT OF THE UNITED STATES.

NO. 227.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

EDSON C. BANGS,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

C. K. DAVIS,
Counsel for Defendant in Error.

Pioneer Press.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 227.

ERROR TO U. S. CIRCUIT COURT, DISTRICT OF MINNESOTA.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

EDSON C. BANGS,
Defendant in Error,

STATEMENT.

The Defendant in Error sued the Plaintiff in Error to recover the amount of two insurance policies which were issued by the company November 22, 1875, upon the life of James A. Bangs, each for $5,000, and payable to the plaintiff. (Complaint, p. 236.)

The policies contain no clause exonerating the company in case of suicide or death by the hand of the assured. (See policies, p. 238 *et seq.*)

The company interposed two answers. The first one (p. 248) averred that the insured died by wilful suicide, to-wit, from the effect of poison voluntarily taken by him with the intention of producing, and which resulted in his death; that in procuring these policies the insured was held out and represented to the company to be sound in health, correct in habits, and with

every prospect of a long life, and to be a person who fully intended to live as long as he should be able to live in the course of nature, and that the company issued the policies on the faith of these representations. *Yet notwithstanding* the premises the representations were false and fraudulent, and at the time the policies were applied for and obtained, Bangs intended to procure said policies and effect his own death within a short time thereafter, and thereby to defraud the company out of the amount of the policies, and that he accordingly did kill himself with that intent.

The action was begun in the State Court in June, 1876. In July, 1876, the company obtained an order removing the case to the Federal Court, upon the ground that the plaintiff Bangs is a citizen of Minnesota.

The record and the above answer were filed in the Federal Court December 11, 1876. The record thus remained until June 18, 1877, when the company, upon leave, filed a supplemental answer (p. 268) averring in substance that on the 24th day of March, 1876, the company filed in the Circuit Court of the United States for the Eastern District of Michigan, its bill of complaint in equity against the plaintiff Bangs, and his mother Eliza C. Bangs, charging them to be then citizens of the State of Michigan, praying to have the policies adjudged null and delivered up to be cancelled, and to restrain the defendants in that suit from instituting or carrying on any action at law to collect them.

It was averred by such bill that the assured died December 5, 1875, from the effects of poison voluntarily taken by him for the purpose of producing death, and that the insured at the time he applied for and obtained the policies, intended to effect his death within a short time thereafter, and thereby to defraud the company out of the amounts of the policies.

The supplemental answer then proceeds to aver that subpœnas were served upon the defendants; the appointment of one Henry A. Harmon as guardian *ad litem* of Edson C. Bangs; an answer by this guardian denying the allegations of fraud; the taking of proofs and a decree on or about June 1, 1877, declaring the policies null and void, ordering them to be

delivered up for cancellation, and restraining the defendants in this suit from instituting or carrying on any action at law upon them, and for costs.

An exemplification of that record is annexed to the supplemental answer, and made a part thereof.

This exemplification, (p. 271,) shows the following facts:

The following notice, (p. 289.)

"To the parent or guardian of Edson C. Bangs, an infant named in the annexed writ:

"Please to take notice that the annexed writ of subpœna, requiring the defendant, Edson C. Bangs, to appear and answer the bill of complaint therein mentioned, and that it will be necessary for said infant to have a guardian appointed to appear and defend his interests in said cause.

"H. L. BAKER,
"*Solicitor for Complainants.*"

The following return of the marshal on the subpœna, (p. 289):

"I hereby certify and return that on the 4th day of April, A. D. 1876, I served the within writ and a copy of the within notice on John M. Smith, guardian of Edson C. Bangs, one of the defendants within named, at Pontiac in said district, by delivering the same to him personally; and I further return that I have made diligent search for Edson C. Bangs and Eliza E. Bangs, and cannot find either of them in my bailiwick."

(p. 290.)

"I hereby certify and return that on the 13th day of April, A. D. 1876, I served the within subpœna, together with a copy of the within notice, on M. Crofoot, counsel for Eliza E. Bangs, one of the defendants within named, at Detroit, by delivering the same to him personally."

(p. 290.)

"I hereby certify and return that on the 29th day of April, A. D. 1876, I served the annexed subpœna on Eliza E. Bangs, one of the defendants therein named, at Pontiac, by leaving a copy of the same at her last known place of residence in said district."

(p. 291.)

"I do hereby certify and return that on the 4th day of April, A. D. 1876, I served the within writ on John M. Smith, the general guardian of Edson C. Bangs, one of the defendants within named, at Pontiac in said district, by delivering to him personally a true copy, and showing him the seal of the Court impressed thereon."

(p. 291.)

An affidavit by H. L. Baker, solicitor for complainants, sworn to April 4, 1876, stating that the subpœna and the injunction have been for a week past in the hands of the marshal for service, who reports to him that the defendants *are not to be found in the district;* that they have locked up the house where they reside, and *have temporarily absented themselves from the State, and that the marshal is unable to find any one now in charge of said house;* that the defendants have heretofore resided in Pontiac in this district, and that deponent is informed and believes that their residence is still there; that Eliza E. Bangs still has possession of the dwelling house in Pontiac, where she now has her household goods and other personal effects; that she obtained insurance upon the goods before going away, and stated that she intended to return in about sixty days; *that the defendants, as deponent is informed and believes, departed from the district within the past sixty days;* that Warren N. Draper, and M. E. Crofoot are employed as attorneys for the defendants in the matters alleged in the bill of complaint; that they acted as the attorneys of Eliza E. Bangs in the proceedings set forth in the bill; that Edson C. Bangs is a minor and lives with Eliza E. Bangs, and that John M. Smith, of Pontiac, is the general guardian of the said Edson.

Whereupon the Circuit Court in Michigan ordered, (p. 292,) April 11, 1876:

"On reading and filing the affidavit of Herbert L. Baker in this cause, and the return of the marshal to the subpœna and injunction issued herein, on motion of Herbert L. Baker, solicitor for the complainant, it is ordered that service of the said subpœna, and the injunction heretofore issued in this cause, which *has been made* upon John M. Smith, the general guardian of the defendant, Edson C. Bangs, be good service upon Edson C. Bangs, and as effectual as though the same were made upon said Edson C. Bangs in person.

It is further ordered that service of said subpœna and injunction may be made upon the defendant, Eliza E. Bangs, by serving the same on M. E. Crofoot, Esq., or Warren N. Draper, Esq., of the city of Pontiac in said district, together with a copy of this order, and by leaving a copy of said subpœna at the last known place of residence of said Eliza C. Bangs, in said district. And it is further ordered that a copy of this order be served on said guardian within ten days from the date hereof."

The company then filed a petition May 11, 1876, (p. 293,) stating in substance that Edson C. Bangs resides in Pontiac in said District, but is now temporarily absent therefrom; that he is about 15 years of age; the service of the subpœna on Smith his general guardian; *that the marshal is unable to find said Bangs in the district;* the service of notice upon the general guardian; that a guardian *ad litem* will be necessary for Edson C. Bangs; that no such guardian has been appointed or applied for,—and prays an order appointing some suitable person such guardian.

May 15, 1876, (p. 295,) Mr. Baker makes an affidavit that the defendants have hitherto refused to permit a post mortem examination to be made of the body of James H. Bangs; that they are aware of the pendency of this suit, and are absenting themselves from the district *for the purpose of avoiding service of process* in the cause and in order to embarrass and delay the

proceedings; that the nature of the cause is such that the defendants should be required to answer the bill without unnecessary delay, because any delay by which the aforesaid examination is postponed renders it more difficult by such examination to ascertain the cause of death.

May 15, 1876, (p. 295,) order of the court, reciting the service of a subpœna upon Edson C. Bangs in accordance with the terms of the order of April 11, 1876, by service thereof on John M. Smith the general guardian, together with a notice as to the necessity for an appointment of a guardian *ad litem;* appoints John M. Smith such guardian, unless the infant shall, within ten days after service of a copy of this order shall be made as hereinafter directed, himself procure a guardian *ad litem* to be appointed; that this order may be served by delivering a copy to the infant, or if he cannot be found at his usual place of residence, to said Smith; that the appearance of the infant be entered and his pleading filed within fifteen days after service of copy of the bill and of this order on said Smith, and that in default the bill be taken as confessed.

May 17, 1876, (p. 297,) copy bill and above order served on Smith; deponent who made service stating that he is unable to find Edson C. Bangs at his usual place of residence in Pontiac.

June 5, 1876 (p. 298,) Mr. Baker makes affidavit that he has received no notice of the appointment of a guardian *ad litem*, though more than ten days have elapsed since the aforesaid service upon Smith.

Whereupon (p. 298) the order of May 15, 1876, appointing Smith guardian *ad litem*, &c., is made absolute.

The bill is then (p. 299) taken as confessed as to Eliza E. Bangs.

An order (p. 299) is then entered (based upon the service on Smith as guardian *ad litem*, of the bill of complaint, the order appointing him such guardian, by which it was also directed

that Edson C. Bangs should demur, plead, or answer within fifteen days after service of the bill and order on said Smith,) reciting that the said Edson *has failed to appear, or answer, or plead, or demur*, and ordering that the bill be taken as confessed by the defendant Edson C. Bangs

Afterwards, (p. 300,) June 10, 1876, the complainants file a petition reciting *that the infant has not appeared:* the service of the order on Smith appointing him guardian *ad litem*, &c.; that *no appearance has been entered by or on behalf of the infant: that Smith has not accepted his appointment, or done any act*, except to write the annexed letter to one of the judges of the Court, which was received by the judge about June 5, and was answered by the annexed letter of the clerk about June 7; *that Smith does not intend to submit the rights of the infant to the adjudication of the Court, but desires to prevent the same from being submitted:* that on June 5th the order pro-confesso was entered; that it is important that the rights of the parties should be brought before the Court for adjudication without delay,—it is prayed that an order may be made revoking the appointment of Smith as guardian *ad litem*, and directing the appointment of some solicitor or officer of the Court as such guardian, to make answer or otherwise bring the rights of the infant before the Court within ten days from his acceptance.

The letters referred to (p. 301–2) are one from Smith to the judge, enquiring what is his "lawful duty" in the matter,—if the judge wishes to see him personally, as the writer; one in answer from the clerk of the Court, stating that if Smith desires to protect the interests of his ward, he had better make answer according to the law and practice of the Court, and "if you are not an attorney, in my opinion you had better take advice of legal counsel, and appear and answer in the case."

"Your counsel will advise you of your legal rights and obligations. You are already in default; whatever you do should be done promptly."

The next step is an order (p. 302.)

"Let an order be entered upon the within petition, appoint-

ing Henry A. Harmon a solicitor of this Court, guardian *ad litem* in place of the within named John M. Smith, who has failed to act, and directing such guardian to answer as therein prayed."

This order was entered (p. 302) June 15, 1876, and directs Harmon to answer or otherwise bring the rights of the infant before the Court within ten days from his acceptance.

Mr. Harmon accepted the appointment (p. 303.) He answered (p. 303) as the guardian *ad litem* for Edson C. Bangs, putting in issue in a general form the material allegations of the bill.

The cause was referred (p. 306) for proofs.

June 30, 1876, (p. 306,) an order was made (apparently *ex-parte*,) directing the master to cause a post mortem examination of the body of James H. Bangs to be made by some competent medical expert, and for that purpose the said master "is hereby authorized to enter upon the grounds where said remains are buried and to cause the said remains to be disinterred, and to do such further acts as may be necessary to the due execution of the order."

The case then proceeded in the way of taking testimony, until May 18, 1877, when the following affidavit was filed, (p. 310):

Hubert L. Baker being duly sworn, says that he is solicitor for the complainants in the above entitled cause; that the said cause was not in readiness for hearing in time to notice the service for hearing and have it placed upon the calendar for the present term of said court; *that a suit at law involving the same subject-matter as this suit is now pending in the State and District of Minnesota*, and the complainants are justly fearful that they shall lose important rights and be seriously prejudiced by the delay in this cause unless the same is brought to a hearing and decree at the present term of this court. Deponent further says *that there is no appearance by the defendants, or either of them, in this case, except that entered for the defendant Edson*

C. Bangs by Henry A. Harmon, the formal guardian ad litem appointed by the court in this cause.

Mr. Harmon consents to the order, and the cause is placed on the docket for hearing (p. 311) May 18, 1876.

June 9, 1876, (p. 312,) a decree is entered decreeing the policies to be null and void; ordering the defendant Edson C. Bangs to deliver them up to be cancelled; enjoining the defendants from carrying on any suits at law to collect them and awarding costs against them—which costs were afterwards taxed at $210.16, (p. 312.)

To this supplemental answer to which the exemplification of the above proceedings were attached and made part, the plaintiff demurred, (p. 315,) assigning that it appears on the face thereof.

First. That it contains no statement of facts sufficient to constitute a defense.

Second. That the proceedings of the Circuit Court of the United States for the Eastern District of Michigan set out in the supplemental answer are void, as appears by the record thereof, which have been filed as a part of said answer, in that it appears that the said Court had no jurisdiction of the person of this plaintiff and no jurisdiction in equity over such action under any circumstances apparent in said record.

This demurrer was sustained (p. 316) at the June, 1877, term, and the cause was continued.

At the December, 1877, term, the defendant, when the cause was called for trial, (p. 318,) by leave of Court, against the objection of the plaintiff, (p. 317,) obtained leave "to withdraw the original answer herein, so as to rest the defense of said action upon the supplemental answer and the matters therein pleaded."

Judgment was then rendered for the plaintiff for $11,004.35 damages and costs, (p. 318.)

LEGAL PROPOSITIONS.

I.

The United States Circuit Court for the District of Michigan proceeded without jurisdiction as to Edson C. Bangs. He was never served with process, and never appeared in that suit.

> *(NOTE.—We take no notice of the record so far as it pertains to Eliza E. Bangs. She was in no way a beneficiary under the policies, and the proceedings against her do not concern us, although the record, and the extracts which we have given from it, show that the Court was, as to her, as void of jurisdiction as it was over the plaintiff in this action.)*

The proceedings in the United States Circuit Court for the Eastern District of Michigan appear upon the record to be in contravention of the act of March 3, 1875.

18 Stat., p. 470.

This act provides that no civil action shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings. Where service cannot be made, the Court can proceed only against parties who are properly before it; "but the judgment or decree shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer."

Statutes, p. 139, sect. 737.

That Edson C. Bangs was neither an inhabitant of the district of Michigan, nor was he at any time served or found therein, or appeared in the action, fully appears.

The marshal returns on the subpœna (p. 289) that he served it on John M. Smith, guardian of Edson C. Bangs; and that

he cannot, after diligent search, find Edson C. Bangs in his bailiwick.

He again certifies (p. 290) that he served it on Smith, his general guardian.

The solicitor of the Company deposes (p. 291) that the marshal reports to him that the defendants are not to be found in the district; that they have locked up their house and temporarily absented themselves from the State, and that he is unable to find any one in charge of the house; that, as deponent is informed, they have departed from the district within the last sixty days.

The solicitor for the complainant again makes affidavit (p. 295) that the defendants are absenting themselves from the district for the purpose of avoiding service of process.

The order (p. 299) states that Edson C. Bangs has failed to appear, or answer, or plead, or demur.

The petition of June 10, 1876, states that the infant has not appeared, nor has any one for him, and that Smith, the general guardian, does not intend to submit the rights of his ward to the adjudication of the Court.

The order (p. 302) recites that Smith has failed to act. Harmon is appointed as guardian *ad litem*, and answers as such simply, (p. 303.) After this, and after testimony had been taken, the solicitor for the complainant, in his motion to have the cause placed upon the calendar for trial, deposes that there is no appearance by the defendants, or either of them in this case, except that entered by the defendant, Edson C. Bangs, by Henry Harmon, the formal guardian *ad litem*, appointed by the Court in this cause.

This record shows that throughout the whole proceeding in Michigan no process, nor any notice or paper in that suit, was ever served upon Edson C. Bangs, althongh the present action was being prosecuted in the Circuit Court for Minnesota under pleadings by which his residence at Faribault, Minnesota, and his citizenship of that State, were admitted.

The power of the Supreme Court to regulate the practice to

be used in suits in equity is limited so that it shall not be in any manner inconsistent with any law of the United States. Stat., p. 175, sect. 917.

The powers of the Circuit Court are likewise limited. *Id.* sect. 918. So that even if the Supreme Court had ever prescribed (as it never has) any rule by which substituted service is permitted, it would have been inconsistent with the act of March 3, 1875.

The 13th Equity rule requires that "service of all subpœnas shall be by a delivery thereof personally, or by leaving a copy thereof at the dwelling or usual place of abode of each defendant with some adult person who is a member of the family."

Rule 14 provides that whenever any subpœna is returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna *toties quoties* against such defendant until *due* service is made.

By rule 22, when necessary or proper, parties are out of the jurisdiction when the bill is filed, it may pray to make them parties if they shall come within the jurisdiction.

So rule 47 provides that where persons cannot be made parties "by reason of their being out of the jurisdiction of the Court, the Court may proceed without making them parties, and in such case the decree shall be without prejudice to their rights."

The Supreme Court has thus nowhere provided for substituted service, and manifestly it never intended to do so.

The only service not personal provided for by the statutes is by section 9 of the act of March 3, 1875, and this is by publication in actions to enforce any legal or equitable lien upon or claim to real or personal property within the district where the suit is brought, and some of the defendants are not inhabitants,

or are not found within the district and do not voluntarily appear.

The only service attempted on Edson C. Bangs is that declared by the marshal's return on pages 289 and 291, viz., on John M. Smith, his general guardian at Pontiac. There is no certificate that this was at the dwelling house or usual place of abode of the infant; or that Smith was an adult person, or that he was a member of Bangs' family, and that this was no service in the opinion of the complainant's solicitor is manifest by the proceedings thereafter taken to have it declared a substituted service.

"Ordinary service on an infant is effected in the same manner as upon an adult."

Daniell's Chy Pr., pp. 500, 498.

No substituted service is permissible under Rule 13, and it is to be remarked that under the old practice in the very exceptional cases where it was allowed, a special order of Court was required in advance to make it valid.

Id. 498.

No order in advance was made in this case. The so called order is not signed by the Judge. It is not an order of course. *It was entered after the service on Smith.*

To warrant extraordinary or substituted service, even under a practice which permits it, there must have been some *thing* or some person in the jurisdiction for the jurisdiction to take hold of. A court cannot create that person or that thing for the purpose of getting jurisdiction.

"As to the general jurisdiction of the Court, it would seem that independent of any statute there is no power in the Court of Chancery to order personal service to be effected out of the jurisdiction; but that in some cases the Court has assumed the power of ordering a service to be effected within the jurisdic-

tion upon some person other than the absent defendant, and have treated such service valid against him."

Daniells, Chy Pr., p. 502.

But this person must be some one having relations to the defendant or to the property in question, such as his solicitor—an agent who has been appointed by the family to act as to their property.

Id. 503.

In Bank of U. S. vs. Ritchie, 8 Peters, 128, the infant defendants were not found, but upon being called appeared by attorney, and on motion of the complainant Thomas Turner was appointed their guardian *ad litem*, and he answered.

Marshall, C. J.

"In all suits brought against infants whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interest devolves to a considerable degree upon the Court." "He was appointed on the motion of the counsel for the plaintiffs without bringing the minors into court or issuing a commission for the purpose of making the appointment. This is contrary to the most approved usage, and is certainly a mark of inexcusable inattention. The adversary counsel is not the person to name the guardian to defend the infants."

This was upon a bill of review filed to set aside the decree which resulted from the appointment of Thomas Turner as guardian.

The decree was annulled, although the infants had actually appeared generally by a person assuming to be their attorney or solicitor before any application had been made to appoint a guardian *ad litem*.

A service of process upon the defendant's attorney will not be ordered, except in cross-suits and injunctions to stay proceedings at law when the defendant resides in another State.

Eckert vs. Bauertt, 4 W. C. C., 370.

We find no case where such a service has been allowed in the Courts of the United States.

"A substituted service on a non-resident, under the provisions of a State law, will not confer jurisdiction on a Circuit Court."

Pomeroy vs. R. R. Co., 4 Bl. C. C., 120.

The Circuit Courts cannot issue process beyond their districts, except in cases specially authorized by law.

Toland vs. Sprague, 12 Peters, 300.
Kendall vs. U. S., Id. 527.
Picquit vs. Swan, 5 Mason, 35.
Richmond vs. Dreyfous, 1 Sum., 131.

In O'Hara vs. McConnell, 3 Otto, 150, the defendant, Mrs. O'Hara, was a feme covert and a minor, and one Burr was her legal guardian. The subpœna was served on O'Hara for himself and wife, and on Burr, April 7, 1869, and on May 7 the bill, without appearance or answer by any defendant was taken as confessed.

Per Cur.—"By the thirteenth rule of practice of the Courts of Equity of the United States, as it stood when the subpœna in this case was served, a delivery of a copy to the husband was good when husband and wife were sued together; but the rule was amended by this Court in 1874 so as to require a personal service on each defendant, at his or her usual place of abode, with some adult member of the family. The service in the present case would not now be good, though it must be held to have been so at the time it was made."

"The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk."

Eq. Rule 17.

No appearance has ever been thus entered by Edson C. Bangs.

To constitute an appearance, there must be some formal entry, or plea, or motion, and this must be of record, and can only be tried by the record.

The appearance of defendants who have not been served with process at the taking of depositions to be used in the cause, was held not to be such an appearance as would defeat an application to remove the cause to the Circuit Court of the United States under the act of Congress of 1789.

Scott vs. Hull, 14 Ind., 136.

The service upon the so-called guardian of Bangs would have conferred no jurisdiction under the former rule in equity.

"To enable a statute guardian to bind his ward by a proceeding in a court of justice, some statute authority must be found for the act. The statutes of the several States on this general subject are not uniform, but I am not aware of any where the statute guardian is made generally competent to represent his ward in legal proceedings. The general rule certainly is that a guardian *ad litem* is to be appointed for that purpose.

1 Johns., 509, 10.
10 Johns., 486.
8 Cow., 365.
3 Chitty Gen. Pr., 288."

Mathewson vs. Sprague, 1 Curt. C. C., 457.

In this case defendants claimed title under a will and a decree admitting it to probate by the Probate Court.

To this it was objected that that Court had no jurisdiction because the Court had dispensed with notice of probate.

To this it was replied that this notice was not necessary, as consent to the decree was given for the plaintiff by his general guardian.

Judgment was for the plaintiff.

Service in New York City on President of a New Jersey corporation doing business in New York City and having its principal place of business there, held invalid.

Day vs. Newark Rubber Co. (Nelson J.) 1 Blatchf., 628.

So it is error when the corporations are doing business in the State where service of process is made under statute and express agreement that it may be there served either upon the president or upon some person specially designated to receive service.

Pomeroy vs. New Haven R. R. Co., (Nelson J.) 4 Blatch., 120.

Telegraph Co. vs. New Orleans, 2 Cent. L. J., 88.

Stillwell vs. Ins. Co., *Id.*, vol. 4, No. 20, 163.

II.

It follows from the first proposition that the Circuit Court in Michigan in appointing a guardian *ad litem* for the infant, had no jurisdiction.

The infant must have been first served.

"There is, however, a fatal objection to the proceeding. Robert Pugh was a minor, and appeared by guardian *ad litem*, who on behalf of the minor waived service of process. This Court has often decided that process should be served on infant defendants in the same manner as if they had been adults. (8 Blackf., 301, 2 Ind. 74.) Here the record on its face shows that the infant was not served with process, because it avers that such service was waived by the guardian. He was not, therefore, properly before the Court."

Pugh vs. Pugh, 9 Ind., 132.

Bill in Equity. The defendants were minors. It did not appear that process was served upon them. On the filing the bill the Court appointed a guardian *ad litem* for the defendants. *Per curian.* "The decree is erroneous. Process should have been served upon the infant defendants in the same manner as if they had been adults."

Hough vs. Canby, 8 Black., 301.

The same ruling upon the same facts was made in

Robbins vs. Robbins, 2 Ind., 74.

The decree of a Court in Chancery against an infant, based upon the appearance of the infant by his guardian, without any previous service of process upon the infant, is void, and the infant cannot be bound by such decree. The infant heir cannot appear and answer by his general guardian only.

Gibson vs. Chouteau's heirs, 39 Mo., 536.

Infant defendants in chancery must be summoned; the appointment of a guardian *ad litem* before they are summoned is irregular, and an answer by him will not justify a decree against them.

Per Cur.—"A guardian *ad litem* was appointed, and put in an answer for the infant heirs of Garrard Jones, deceased, when no process seems to have been executed upon them. The order appointing him was irregular and erroneous until after they were served with process."

Jones vs. McGinty, 3 Dana, (Ky.) 426.

"The heirs of Collard were infants, and non-residents. Without any publication or other service a guardian *ad litem* was appointed to defend for them, who answered, and the Court, on the final hearing, perpetuated the injunction, and rescinded the contract. This decree must be reversed.

The heirs, who were necessary parties, were not before the Court. The order appointing the guardian states that it was made by consent of parties. But who were the parties? The heirs were not, as there had been no service on them,—actual or constructive. They would not therefore be bound by the decree for anything which the record exhibits."

Collard's heirs vs. Groom, 3 J. J. Marsh, 487.

The chancery rule in Mississippi provided that no order appointing a guardian *ad litem* to defend infant defendants will be made until after return day of process executed, or until after publication in case of non-residents."

Held, that an appointment made of a guardian *ad litem* without the Court has obtained jurisdiction of the infant, is invalid and erroneous."

Stanton's heirs, vs. Pollard, 24 Miss., 154.

Per Cur.—"If there were no rule of Court forbidding the appointment of a guardian *ad litem* before process served, or publication made against infants, we are satisfied, upon general principles of equity and right, it would not be competent for the Court to act upon their rights until service of process, either actual or constructive, had given the Court jurisdiction of their persons. In England the usual practice was not to appoint a guardian *ad litem* until the infant was brought into the actual presence of the Court, in order to ascertain if the infant were of proper age to make the choice, whom he desired to act for him. (Coop. Eq., 108, 109. Fonb. Eq., 237.) In case the infant was a non-resident, it was necessary to issue a commission for the appointment. 11 Vesey, 563."

"But again, no such decree as that rendered here could have been legally made in the absence of the minor children of Mrs. Boggan. In the case we are considering leave was granted to amend the bill so as to make them parties, but such amendment does not appear in the record; nor does it appear that process was either served on them personally or otherwise. A guardian *ad litem* was appointed for them, who appeared and answered for them; but the Court had no jurisdiction over them until service of process, to make such order."

Prewell vs. Land, 36 Miss., 508.

"James L. Crippen, one of the infant heirs of John F. Crippen, deceased, was not served with process, and is not before the Court. The answer of the guardian *ad litem* does not give the Court jurisdiction.

Crippen vs. Crippen, 1 Head, 129.

III.

Under the statutes of Michigan the service on Smith as general guardian of the infant was void.

"Every guardian appointed as aforesaid, (viz., by Judge of

Probate,) shall have the care and management of the estate of the minor."

Statutes Mich., Title Guardian Ward, p. 1480, sect. 4816.

"Nothing contained in this chapter shall impair or affect the power of any court of common law, Probate Court or Court of Chancery, or Court of a Justice of the Peace, to defend the interests of minors impleaded in such court."

Id. p. 1482, sect. 4821.

"Writs of summons shall be served by showing the original writ to the defendant and delivering to him a copy thereof; and on the return of the writ personally served, the defendant shall be considered in Court, and may be proceeded against accordingly."

Stat. Mich., p. 1665, sect. 5732.

"After the issuing and service of process against any infant defendant, or the service of a declaration, if the suit be commenced by declaration, the suit shall not be any further prosecuted until a guardian for such infant shall have been appointed."

Statutes of Mich., p. 1836, s. 6537.

He is to be appointed upon request of the infant.

Id., s. 6538.

Or by the Court, if he refuses, after having been served with an order directing him so to do.

Id., sects. 6534, 6540.

IV.

The proceedings set up in the supplemental answer are void, because they were brought and prosecuted in violation of section 16 of the judiciary act.

"Suits in equity shall not be sustained in either of the

Courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Stat., p. 137, sect. 723.

This suit, in Michigan, was brought and sustained *pari passu* with the answer in the case at bar, which set up as a defence the same facts with those which were pleaded in the bill. (See answer, p. 248.)

That suits in equity to cancel policies of insurance on the ground of fraud in obtaining them will not be sustained, see—

Ins. Co. vs. Bailey, 13 Wallace, 616.

Home Ins. Co. vs. Stanchfield, 1 Dillon, p

And where this violation appears it is jurisdictional, notwithstanding the Court sitting in equity may have proceeded to a decree, and notwithstanding technical allegations of fraud, or of the necessity for a discovery.

Parker vs. Winnepisseogee Co., 2 Black., 545.

Per Cur.—"It was urged at the hearing as an insuperable objection to the relief prayed for, that the appellant had not established his right by an action at law. The objection was not taken by demurrer, or in the answer. In the Courts of the United States it is regarded as jursidictional, and may be enforced by the courts *sua spente*, though not raised by the pleadings, nor suggested by counsel. (2 Cr., 419; 5 Pet., 496; 2 How., 383. * * In such case the adverse party has a constitutional right to a trial by jury."

V.

The defendant waived any defense under the proceedings in Michigan by pleading to the merits, as it did the same facts with those alleged in the bill in the Michigan case.

It cannot restore itself to that defence, as was attempted here, by withdrawing its first answer on the eve of trial. If it once waived the defence of another suit pending, the plaintiff acquired the benefit of that waiver as a right.

This suit, being at law, is governed by the laws of the State of Minnesota as to pleadings and practice.

The statutes of Minnesota provide that—

"The defendant may demur to the complaint within twenty days after the service thereof, when it appears upon the face thereof.

* * * * * *

"*Third.* That there is another action pending between the same parties for the same cause. * *."

Bissell's Minn. Stat., p. 796, sect. 80.

"When any of the matters enumerated in section eighty do not appear upon the face of the complaint, they may be taken by answer."

Id., p. 797, sect. 82.

"If no such objection is taken, either by demurrer or answer, the defendant is deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

Id., sect. 82*.

Pendency of a former action is matter of abatement, and is waived if not pleaded.

Taylor vs. Parker, 18 Minn. 88.
18 Johns, 257.
1 Blackf., 214.
3 Sumner, 289.

Such a plea must show that the Court had jurisdiction.

3 McL., 221.
1 Cush., 494.
10 Pick., 470.

VI.

It is apparent that this litigation by the plaintiff in error has been dilatory, meritless, and vexatious throughout. We submit that the Court should impose a penalty under the rule.

The judgment should be affirmed.

C. K. DAVIS,
Counsel for Defendant in Error,
St. Paul, Minn.